CORRECTED COPY

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-287

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

ANTHONY BLANKS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

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TABLE OF CASES

STATUTE CITED

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

Petitioner prays that a writ of certiorari issue to review the order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, which affirmed a sentence of the Supreme Court, Westchester County sentencing Anthony Blanks to a term of 25 years to life upon his conviction of the crime of Murder in the First Degree.

Citation to the Opinons Below

The certificate denying leave to appeal to the New York Court of Appeals is reported at —— N.Y. 2d —— (Appendix A).

The opinion of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department is

reported at —— A.D. 2d ——, —— N.Y.S. 2d —— (Appendix B).

The sentence of the Supreme Court of the State of New York, Westchester County is unreported (Appendix C).

Jurisdiction

The Order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department was dated and entered April 10, 1978.

The certificate denying leave to appeal to the New York Court of Appeals was dated May 23, 1978.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

Question Presented

Does the New York statutory scheme providing for the imposition of the death penalty upon conviction of the crime of murder in the first degree for the intentional killing of a police officer in the performance of his duties offend the Constitution of the United States?*

Constitutional and Statutory Provisons

Section 125.27 of the Penal Law of the State of New York defines the crime of murder in the first degree and sections 60.05 and 60.06 provide for the punishment. The Eighth Amendment of the Constitution of the United

* On June 27, 1978, a petition for certiorari was denied in a case involving a different subdivision of the New York Statute, dealing with the killing of a correctional officer. (*People* v. *Davis*, 43 N.Y. 2d 17, 400 N.Y.S. 2d 735, 371 N.E. 2d 456 (1977), cert. den., *sub nom. New York* v. *James*, —— U.S. —— [June 27, 1978]).

States prohibits the imposition of cruel and unusual punishment.

Facts

On October 12, 1976, the defendant Anthony Blanks was trespassing on railroad property and his presence caused a commuter train to come to an emergency stop. The engineer called the Larchmont Police Headquarters and requested that an officer be dispatched to remove the defendant. Patrolman Arthur DeMatte, in complete uniform and driving a marked patrol car, was dispatched to the scene. The officer saw the defendant, radioed Headquarters and was advised to remove him. The officer approached the defendant and directed him to remove himself. The defendant grabbed the officer's revolver from its holster and shot Officer DeMatte through his left forearm, severing the artery and breaking the bone. The officer, unarmed, ran for his life, pleading for help, to a nearby parking lot. Blanks, in pursuit of the wounded officer fired one shot that missed its mark. Then, in full view of six witnesses, at a time when the officer was wounded, unarmed and standing with his hands up in a surrender position, the defendant, Anthony Blanks fired a shot from approximately ten feet into the officer's heart, killing him.

The defendant was charged with the crimes of murder in the first degree and criminal possession of a weapon in the second degree. On July 22, 1977, after a trial by jury, the defendant was convicted of the crime of possession of a weapon in the second degree (on February 28, 1978, he was sentenced to a term of four to twelve years) and the trial jury announced its disagreement on the charge of murder in the first degree.

On October 26, 1977, jury selection commenced on the re-trial of the charge of murder in the first degree. On

November 17, 1977, the defendant moved for a mistrial which was granted over the objection of the People. The defendant then moved to dismiss the charge of murder in the first degree alleging that the New York Court of Appeals in *People* v. *James* (*People* v. *Davis, supra*) had declared the New York murder in the first degree statute (PL § 125.27) unconstitutional. The trial judge denied the defendant's motion except to the extent that the charge was reduced to murder in the second degree. On appeal by the People to the Appellate Division of the Supreme Court of the State of New York, the charge of murder in the first degree was reinstated (*People* v. *Blanks,* 59 A.D. 2d 930, 399 N.Y.S. 2d 426 (1977)),[1] and leave to appeal to the Court of Appeals denied by order of Hon. Sol Wachtler (43 N.Y. 2d 795 (1977)).

Jury selection again commenced on January 10, 1978, and on February 2, 1978, the jury returned a verdict convicting the defendant of the crime of murder in the first degree as charged in the indictment.

On February 23, 1978, over the objection of the People, Anthony Blanks was sentenced to a term of 25 years-life, McMahon, J. The People appealed the legality of the sentence.[2] The defendant appealed from both judgments and those appeals, as consolidated, remain pending.

Summary of the Argument

The crime of murder in the first degree[3] is punishable by the penalty of death.[4] An analysis of the statutory scheme makes it clear that the New York statute which provides for the imposition of the death penalty in an extremely narrow category of cases and provides for the consideration of mitigating circumstances, in all respects complies with constitutional mandates.

[1] Appendix D.

[2] Criminal Procedure Law § 450.20(4).

[3] Penal Law § 125.27.

[4] Penal Law §§ 60.06, 60.05(1).

POINT I

The New York statutory scheme providing for the imposition of the death penalty upon conviction of the crime of murder in the first degree is constitutional.

The Constitution prohibits the imposition of cruel and unusual punishment,

> "it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such." (cit. om.)
>
> *Ingraham* v. *Wright,* 430 U.S. 651 (1977),

but does not prohibit the imposition of the death penalty in an appropriate case.

> "the death penalty is not a form of punishment, that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it."
>
> *Gregg* v. *Georgia,* 428 U.S. 153 (1976).

However, as "death as a punishment is unique in its severity and irrevocability," it is only "suitable to the most extreme of crimes." (*Gregg* v. *Georgia, supra* 187). In order to warrant the imposition of the ultimate penalty, the crime must be of "the most extreme" and it is by that criterion that any statute must require that a criminal offense be examined and must itself be examined to determine whether it passes constitutional muster.

Any statute which permits the imposition of the death penalty must provide for the consideration of relevant factors surrounding the crime and the offender so that the penalty is not imposed in the arbitrary and capricious manner condemned in *Furman* v. *Georgia,* 408 U.S. 238 (1972). Whether those factors are referred to as aggravating and mitigating circumstances or by some other appellation, the only true consideration is, is the crime of "the most extreme?".

While the death penalty may not be appropriate in any case other than one in which a life is taken (See: *Coker* v. *Georgia,* 433 U.S. 584 (1977)), it may be appropriate in the case of murder.

> "the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe."
>
> *Gregg* v. *Georgia, supra,* 187.

Any factors which are to be considered must, in some manner be set forth in the statute, be it in the form of a "laundry list" (see, e.g. F.S.A. 921.141 [Fla.]) or otherwise. Texas has chosen not to list "aggravating" factors in its statute but simply to limit the definition of the crimes for which the penalty may be considered, a constitutionally permissible alternative.

> "While Texas has not adopted a list of statutory aggravating circumstances . . . its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose . . . in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed."
>
> *Jurek* v. *Texas,* 428 U.S. 262, 270.

New York, like Texas, has chosen to limit the crimes for which the penalty of death may be imposed rather than to set forth a statutory list of "aggravating" factors. Indeed, the New York statute encompasses far fewer crimes than that of Texas. When compared to the statutes which have been upheld by this Court,

> "the death penalty is (available)—even potentially—for a smaller class of murders in (New York)."
>
> *Jurek* v. *Texas,* supra, 271.

One of the three circumstances in which the death penalty may be imposed in New York is the intentional murder of a police officer in the performance of his duties, an appropriate "aggravating" factor,

> "to be sure, the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravating circumstance."
>
> *H. Roberts* v. *Louisiana,* 431 U.S. 633 (1977).

And even then, the New York statute is further limited in that the defendant must have known, or reasonably should have known, that his victim was a police officer, a knowledge which is not constitutionally necessary before additional punishment may be imposed (*United States* v. *Feola,* 420 U.S. 671 (1975)). Yet, there may be other factors, "mitigating" factors, which indicate that the crime in question is not "the most extreme."

The New York statute treats "mitigating" factors in the same manner as "aggravating," not by setting them forth in a list, but in the definition of the crime itself and other statutory provisions. To paraphrase this Court; in essence, the New York statute requires that the jury find the absence of statutory "mitigating" circumstances before the death penalty may be imposed (See: *Jurek* v. *Texas, supra*).

Age is a factor which is generally considered on the issue of mitigation and quite appropriately so, considering the

age of adult criminal responsibility in some states. In Florida, a child of any age who commits a crime punishable by life imprisonment or death may be charged and punished as an adult (F.S.A. 39.02(5)(c)). Age is considered as a mitigating factor, but only where the defendant is under eighteen (see: *Songer* v. *State*, 322 S. 2d 481 (1975)). In Texas, the age of adult criminal responsibility is fifteen but no person may be punished by death for an offense committed while he was younger than seventeen (V.T.C.A., Penal Code § 8.07). Age is not listed as a mitigating factor but by statute is such to the age of seventeen. In Georgia, the age of criminal responsibility is thirteen (Ga. Code Ann. 26-701). Age can be considered by the jury when it considers "appropriate" mitigating circumstances (Ga. Code Ann. § 27.2534.1(b); *Moore* v. *State*, 233 Ga. 861, 865, 213 S.E. 2d 829, 832 (1975)). The age of criminal responsibility in Oklahoma is seven[5] and a defendant can be certified for trial as an adult if the charge is a felony (10 Okl. St. Ann. § 1112). The statute stricken by this Court[6] mandated the death penalty upon conviction without any consideration of mitigating factors, including the age of the defendant (21 Okl. St. Ann. § 701.3). A North Carolina defendant who has reached his fourteenth birthday and is charged with a felony may be tried in an adult court but if he is charged with a capital crime must be so tried (N.C. Gen. Stat., 7A-280). Upon conviction of murder in the first degree, the statute stricken by this Court[7] mandated the death penalty without any consideration of age in mitigation (N.C. Gen. Stat., 14-17). In Louisiana, the age of criminal responsibility is seventeen, but in the case of a capital crime, fifteen (LSA-R.S. 13:1570(5)).[8] The statute in addition to reducing the age of criminal responsibility mandated the death penalty upon the conviction of murder in the first degree (LSA-R.S. 14:30) and was held to be unconstitutional.[9]

[5] Between the ages of seven and fourteen, it must be shown that the defendant knew the wrongfulness of his conduct (21 Okl. St. Ann. § 152).

[6] *Green* v. *Oklahoma*, 428 U.S. 907 (1976).

[7] *Woodson* v. *North Carolina*, 428 U.S. 280 (1976).

[8] The Ohio Statute stricken in *Lockett* v. *Ohio*, —— U.S. —— (Dec. July 3, 1978) applies to any person fifteen or older (Ohio Rev. Code Ann. § 2151.26).

New York, like Florida, Texas and Georgia considers age a mitigating factor and like Texas considers it such by definition. Sixteen is the age of criminal responsibility in New York (Penal Law § 30.00), but no person can be convicted of murder in the first degree unless he "was more than eighteen years old at the time of the commission of the crime." (Penal Law § 125.27(1)(b)). In New York youth is a mitigating factor to a greater extent than in Texas or Florida[10] and unlike in Georgia and Florida, it must be found beyond a reasonable doubt not to be present before the death penalty can be imposed.[11]

"Absence of any prior conviction" is a relevant factor which may be considered in mitigation (*H. Roberts* v. *Louisiana, supra*). It has long been held that a greater punishment may be imposed on recividists (*Moore* v. *Missouri*, 159 U.S. 673 (1895); *McDonald* v. *Massachusetts*, 180 U.S. 311 (1901); *Graham* v. *West Virginia*, 224 U.S. 616 (1912); *Spencer* v. *Texas*, 385 U.S. 554 (1967)), and the presence of a prior record is a factor which may

[9] *S. Roberts* v. *Louisiana*, 428 U.S. 325 (1976); *H. Roberts* v. *Louisiana*, 431 U.S. 633 (1977).

[10] In Texas it is only mitigating to age 17 (V.T.C.A., Penal Code § 8.07) and in Florida to age 18 (*Songer* v. *State, supra*) but in New York to age 19 (Penal Law § 125.27(1)(b)).

[11] In Georgia age is considered only under the general category of "appropriate mitigating circumstances" (Ga. Code Ann. § 27.2534.1(b)). In Florida it must simply be found that aggravating circumstances outweigh mitigating circumstances (F.S.A. § 921.141). As age is an element of the crime in New York, it must be proven beyond a reasonable doubt that the defendant was over the age of 18 or he cannot be found guilty of a capital crime.

reasonably be considered in determining whether the crime to be punished is "the most extreme" and hence one warranting the ultimate penalty.

Florida sets forth as a mitigating factor the fact that "the defendant has no significant history of prior criminal activity" (F.S.A. 921.141) but the finding of that mitigating factor does not mean that the death penalty cannot be imposed if the aggravating circumstances outweigh the mitigating circumstances. In Georgia, a defendant's prior record is considered under the general category of other appropriate aggravating or mitigating circumstances and in Texas the prior record is considered in determining "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" (V.T.C.A., Code Crim. Proc. § 37.071(b)). The other statutes considered and found by this Court to violate constitutional mandates allow no consideration of a defendant's prior record.[12]

The New York statute does not allow consideration of the defendant's prior record on the issue of mitigation but the statute itself virtually ensures that the defendant has a prior record[13] or that the defendant would constitute a continuing threat to society. The New York statute encompasses only intentional murder committed by "lifers,"[14] who of necessity have committed a prior serious felony offense, intentional murder of a correctional em-

[12] N.C.Gen. Stat. 14-17; LSA-R.S. 14:30; 21 Okl. St. Ann. § 701.3; Ohio Rev. Code Ann. § 2929.03.

[13] The instant defendant, Anthony Blanks, has no prior criminal record.

[14] The crimes punishable by life are attempted murder in the first degree (PL § 125.27, 110.0), murder in the second degree (PL § 125.25), arson in the first degree (PL § 150.15), kidnapping in the first degree (PL § 135.25), criminal sale of a controlled substance in the first degree (PL § 220.43), and criminal possession of a controlled substance in the first degree (PL § 220.21).

ployee in the course of his duties[12] and intentional murder of a police officer in the performance of his duties. The New York statute is thus "limited to an extremely narrow category of homicide . . . defined in large part in terms of the character or record of the offender."[15] (*Woodson* v. *North Carolina*, 428 U.S. 280, 287, ftnte 7 (1976)). In the latter case, it would seem that the question considered by the Texas jury could be answered in the affirmative, whether or not there were prior convictions, upon a finding that the defendant knowingly and intentionally killed a person he knew to be a police officer performing his duties. After all, it is the police officer's duty to enforce the law and by killing him a defendant shows contempt not only for the law but also for its enforcement. There would appear to be no person who would constitute a more continuing threat to society.[16]

The intent of the defendant when he commits the homicidal act is probably the most important consideration in a determination of whether the crime is of "the most extreme."[17] The Florida statute broadly defines the crimes which subject a defendant to the death penalty and includes certain "felony murders." (F.S.A. 782.04). Thus, one of the mitigating circumstances is that "the defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor." Yet, one who did not commit the murder or intend that the murder be committed could be sentenced to death if aggravating

[15] While the quoted statement specifically referred to murder by a "lifer", the contrast to "a broad category of homicidal offenses" clearly indicates that the statement would apply to the New York statute.

[16] That is one of the instances in which the death penalty can be imposed in Texas (V.T.C.A. Penal Code § 19.02(a)).

[17] Compare *Lockett* v. *Ohio, supra.* The Ohio statute would not allow consideration of the defendant's lack of intent or minor role in mitigation.

factors outweigh that mitigating factor. The Florida statute also lists as mitigating circumstances the fact that the crime "was committed while the defendant was under the influence of extreme mental or emotional disturbance," that the defendant "acted under extreme duress or under the substantial domination of another person" and that "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." The statute subjects to the death penalty a number of defendants who did not have the intent to kill and only allows them to argue the lack of intent as a mitigating circumstance which may or may not be sufficient to save them from execution.

The New York statute, which applies only to intentional murder, like that of Florida, considers the intent of the defendant, but unlike Florida does not look to a statutory list of mitigating factors but simply to the intent of the defendant.[18] Thus, it is a mitigating factor that "the defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor" because the defendant would lack the necessary intent to murder and thus be guilty of only murder in the second degree.[19] It is a mitigating factor that the crime "was committed while the defendant was under the influence of extreme mental or emotional disturbance" and the defendant could only be convicted of manslaughter in the first degree.[19] It is a defense that the defendant "acted under extreme duress or under the substantial domination of another person,"[20] and to the extent that the defendant was precluded from forming the necessary intent, a mitigating factor.[21] That "the capacity of the defendant to appreciate

[18] PL § 125.25.

[19] PL § 125.27, 125.20.

[20] PL § 40.00.

[21] PL § 15.05.

the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired," whether by alcohol[22] or drugs[23] is a mitigating factor to the extent that if the defendant could not form the necessary intent the degree of guilt is reduced. If the defendant lacked substantial capacity to know or appreciate either the nature and consequence of his conduct or that such conduct was wrong,[24] a conviction would be precluded.

The New York statute contains aggravating and mitigating factors, though not delineated as such, and permits the imposition of the death penalty only in crimes of "the most extreme."

The Florida statute refers to only one other "mitigating factor," that being that "the victim was a participant in the defendant's conduct or consented to the act." The statute apparently makes reference to accomplices and suicides, neither of which would be victims under the New York statutes[25] and to that extent, the New York law contains the same "mitigating factor."

[22] PL §15.25; *People* v. *Jones*, 27 N.Y. 2d 222, 316 N.Y.S. 2d 617, 265 N.E. 2d 446 (1970).

[23] PL § 15.25; *People* v. *Brown*, 57 A.D. 2d 869, 394 N.Y.S. 2d 242 (1977).

[24] PL § 30.05.

[25] Compare the Louisiana statute, found unconstitutional in *H. Roberts*, which provides in pertinent part, "First degree murder is the killing of a human being: (2) when the offender has the specific intent to kill, or to inflict great bodily harm upon, a fireman or peace officer who was engaged in the performance of his lawful duties" (LSA-R.S. 4). That statute would mandate the death penalty for a defendant whose only intent was to cause "great bodily harm" to a person who happened to be a peace officer in the performance of his lawful duties and who caused the death of another, even if it happened to be his own accomplice.

Conclusion

There is no "magic formula" for determining what factors should be considered mitigating, what weight should be given to each or in what manner they should be set forth or considered. The Constitution mandates only that appropriate aggravating factors be considered.

> ". . . it is essential that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender *or* the particular offense." (emphasis supplied) *H. Roberts* v. *Louisiana, supra.*

The Florida statute lists factors which may be considered in mitigation, the Georgia statute requires consideration of "any mitigating circumstances . . . authorized by law," the Texas statute requires the jury to determine whether the defendant's future conduct would "constitute a continuing threat to society" and the New York statute mandates simply that the absence of a number of what may be referred to as mitigating circumstances be found beyond a reasonable doubt.

> "It is possible that a state statute that required the jury to consider, during the guilt phase of the trial, both the aggravating circumstance of killing a peace officer and relevant mitigating circumstances would pass the plurality's test."
>
> *H. Roberts* v. *Louisiana,* supra, Blackman, J. dissenting.

In form, the statutes differ; in substance, they are the same. The New York statute does not offend the Constitution.[26]

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[26] As further required, the statute permits an appeal directly to the Court of Appeals (CPL § 450.70(1)).

Appendix A, Certificate Denying Leave.

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. HUGH R. JONES, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

against

ANTHONY BLANKS,

Respondent.

I, HUGH R. JONES, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Utica, New York
May 23, 1978

HUGH R. JONES
Associate Judge

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* Description of Order: Order of Appellate Division, Second Department, dated April 10, 1978, affirming sentence of Supreme Court, Westchester County, imposed February 23, 1978 [conviction of murder first degree].

Appendix B, Order on Appeal from Sentence.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department held in Kings County on April 10, 1978.

HON. MILTON MOLLEN, Presiding Justice,
HON. JAMES D. HOPKINS,
HON. JOSEPH A. SUOZZI,
HON. J. IRWIN SHAPIRO,
HON. CHARLES MARGETT, *Associate Justices.*

The People of the State of New York,

Appellant,

v.

Anthony Blanks,

Respondent.

In the above entitled action, the above named, The People of the State of New York, defendant in this action, having appealed to this court from a sentence of the Supreme Court, Westchester County, imposed February 23, 1978, upon defendant's conviction of murder in the first degree, the sentence being a term of imprisonment of 25 years to life; and the said appeal having been submitted by Jane Cunard, Esq., of counsel for the appellant, and submitted by Peter A. Meisels, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion & decision slip heretofore filed and made a part thereof, it is:

Appendix B, Order on Appeal from Sentence.

ORDERED that the sentence appealed from is hereby unanimously affirmed.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

—— AD2d ——

S—March 29, 1978

1210 SE

The People, etc., appellant v. Anthony Blanks, respondent.

Carl A. Vergari, District Attorney, White Plains, N.Y. (Jane Cunard of counsel), for appellant.
Stephen J. Pittari, The Legal Aid Society of Westchester County, White Plains, N.Y. (Peter A. Meisels of counsel), for respondent.

Appeal by the People from a sentence of the Supreme Court, Westchester County (MCMAHON, J.), imposed February 23, 1978, upon defendant's conviction of murder in the first degree, upon a jury verdict, the sentence being a term of imprisonment of 25 years to life.

Sentence affirmed.

The only issue that the People have raised, and that we have passed upon on this appeal, is the legality of the sentence imposed by the trial court, and not the propriety of that sentence. We hold that the sentence imposed by the trial court was a legal sentence (see *People* v. *James*, 43 NY2d 17). We note that defendant has appealed from the judgment convicting him of the crime of murder in the first degree and that appeal has not as yet been perfected. Upon the perfection of defendant's appeal, he may raise

Appendix B, Order on Appeal from Sentence.

any issues, as he sees fit, with regard to the sentence imposed.

MOLLEN, P.J., HOPKINS, SUOZZI, SHAPIRO and MARGETT, JJ., concur.

April 10, 1978 PEOPLE v. BLANKS, ANTHONY 1210 SE

Appendix C, Sentence.

Indictment No. 911/76

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF WESTCHESTER

THE PEOPLE OF THE STATE OF NEW YORK

—against

ANTHONY BLANKS,

Defendant.

Courthouse
White Plains, New York
February 23, 1978
10:00 A.M.

Before:

HON. DANIEL F. MCMAHON,

Acting Justice.

Appearances:

HON. CARL A. VERGARI,
District Attorney, Westchester County;
111 Grove Street
White Plains, New York 10601

By: WILLIAM M. FREDRECK, Esq., and
JANE CUNARD, ESQ.,
Assistant District Attorneys.

Appendix C, Sentence.

STEPHEN J. PITTARI, ESQ.,
Legal Aid Society of Westchester County;
One North Broadway
White Plains, New York 10601

By: PETER A. MEISELS, ESQ.,
of Counsel.

Jerry Pellis, C.S.R.,
Official Court
Reporter

PROCEEDINGS

The Clerk: For sentencing, the People vs. Anthony Blanks.

Are the People ready?

Mr. Fredreck: Yes.

The Clerk: Is the defendant ready?

Mr. Meisels: Yes. Before we proceed, I have one application to make.

For the various reasons already stated by me on the record during the trial and the objections that I made to the Court's charge, I would at this time ask for a judgment non obstante veredicto.

The Court: Denied.

Mr. Meisels: We are ready to proceed.

Mr. Fredreck: For the record, the case of People vs. Anthony Blanks is on the calendar this morning for sentencing. This is Indictment No. 911/76. The defendant having been convicted by a jury of the crime of murder in the first degree on February 2, 1978, your Honor set today as the sentence date. At this time the People would move for sentence, your Honor.

The Clerk: Mr. Blanks, do you have any legal cause to show why judgment should not be pronounced at this time?

Appendix C, Sentence.

The Defendant: No, I don't, not at this particular time.

The Clerk: Do the People have any position?

Mr. Fredreck: Yes, your Honor. May I be heard on our position briefly?

The Court: You may.

Mr. Fredreck: Your Honor, in making a short statement at this time of sentencing, I do not intend to rehash all the facts of the case. Your Honor a very short time ago presided over this trial and is thoroughly familiar with those facts.

As you know, from the outset of this case in October of 1976 up to and including today, it has been the People's position that the capital punishment, the death penalty, applies to this case. We had many discussions about this with your Honor prior to trial, and the People prior to commencing trial placed their position on the record at that time. So at this point, Judge, I just want to recommend on behalf of the People that this defendant, Anthony Blanks, be sentenced to the maximum sentence allowable under the laws of our state. I would ask in a moment that the Court give leave that Miss Cunard of the Appeals Bureau make comments and perfect the record as to our position in this area, Judge.

Before asking that Miss Cunard be heard, I would just like to briefly state that perhaps if there is anyone who is more familiar, or at least equally familiar with this case as I am, it's Mr. Meisels, and he is going to address the Court in a minute. I feel, Judge, that in the entire background of this case, there is one and only one mitigating factor, and that very simply is Anthony Blanks for 23 years hadn't been arrested. Other than that, Judge, I see none.

I think that in a case of this nature—I have tried cases before this court and your Honor and other judges, and your Honor has tried cases. I haven't seen a more cold-blooded killer, perhaps with the exception of the Lewisboro

case, on which a verdict was rendered yesterday, than in this case.

The Legislature, in writing Section 125.27, mandated in their opinion the death penalty is to apply to this crime. I think the punishment should fit the crime.

This is a case which I maintained from the beginning, Judge, was one of cold blood, wherein this defendant, Anthony Blanks, disarmed a police officer and didn't give the man a chance; that after disarming him he shot him, wounded him, chased him, caught up with him, shot him, and killed him. We know from the trial testimony that at least three shots were fired, all by the defendant, none by the police officer. We know from the trial testimony the police officer was at all times disarmed and never the aggressor.

Officer DeMatte is dead and never told us what happened, as to how he became disarmed. The only one who has told us anything in an attempt to shed any light on this has been the defendant, and I think without even elaborating on it, Judge, the defendant has yet to tell us the truth. I don't know what he has told Mr. Meisels. I am not privy to that. But to my knowledge, this defendant hasn't told anybody the truth as to the motivation for disarming this officer and killing him—an officer who I don't think can be forgotten, a man who was a policeman for 19½ years, and had a reputation for never even drawing his gun.

As you know, Judge, he was the father of four children and had a wife living in Larchmont. It was just cold-blooded, and I haven't seen anything like it. I tried Joseph Davis, who was sentenced by Judge Jones to the death penalty, and his killing of Harold Woods was not one-tenth as cold-blooded as Anthony Blanks' killing of Arthur DeMatte, and with that in mind, Judge, I just want to state that I strongly recommend that this Court sentence Anthony Blanks to the maximum sentence allowable by our laws, and

with that, Judge, I would ask your Honor to give leave for Miss Cunard to place our position on the record, vis-a-vis the death penalty.

The Court: I certainly will do that.

You have no objection, Mr. Meisels?

Mr. Meisels: None, your Honor.

The Court: Miss Cunard, we will hear from you.

Ms. Cunard: Your Honor, the defendant has been convicted of the crime of murder in the first degree, in violation of Section 125.27 of the Penal Law. Section 60.06 of the Penal Law mandates the imposition of the death penalty. The Court is given no other choice. That statute is on the books. It is the law of the State of New York.

The Court: Miss Cunard, what about People against James in the Court of Appeals in this state?

Ms. Cunard: Recently the New York Court of Appeals held in People against James that that statute is unconstitutional. There has been a petition for certiorari filed with the United States Supreme Court. It's strictly a question of Federal constitutional law. The issue has not yet been finally decided within the State of New York.

Regardless of the decision of the New York Court of Appeals, that statute is still on the books and it is still mandatory. It is the only authorized sentence upon a conviction of murder in the first degree, and it will be the only authorized sentence until the statute is removed by the Legislature.

Now, with the Court of Appeals having held the statute unconstitutional, and even if the Supreme Court so held it, what would be the remedy? The law of the State of New York provides a remedy. The courts on appeal cannot modify the judgment or sentence. The courts on appeal can sentence the defendant to a life term. The law of New York does not give such power to the trial court.

The law of the State of New York mandates that upon conviction of the crime of murder in the first degree, the

trial court impose a sentence of death. If that is later determined to be unconstitutional or for some other reason illegal, the remedy is with the defendant on his appeal. He has an appeal as of right directly to the New York Court of Appeals, and if that court believes the statute to be unconstitutional and is not overruled by the United States Supreme Court, that court will do as it did in James.

It will examine the evidence and see if there is also proof beyond a reasonable doubt of the crime of murder in the second degree, and if there is, the court will impose the sentence for murder in the—I am sorry, the court will not impose; the court will direct that the trial court impose a sentence proper for murder in the second degree on remand. But the Court of Appeals, is the only court, because the case would not go to the Appellate Division, that can reduce the degree of crime.

This Court has no alternative but to impose the only statutorily authorized sentence: death. And the People recommend that the death sentence be imposed in this case.

The Court: Thank you, Miss Cunard.

Mr. Meisels, do you wish to be heard both on that point and the plea on behalf of the defendant before sentence?

Mr. Meisels: Yes, your Honor. I would like to address Miss Cunard's point just briefly. I know that we have discussed this at length on the record on many occasions, we have submitted briefs on the point prior to the commencement of trial, and I don't want to belabor it further. However, basically, what I think the People are requesting is that the Court impose an illegal sentence.

At the time that this matter was discussed before Judge Wachtler, he made it perfectly clear to Mr. Morosco and to Miss Cunard that the least persuasive point in all their argument was the fact that someone might petition for certiorari. You see, as I understand it, the Court of Appeals does not consider itself to be an intermediate appellate court, and the Court of Appeals is under the impression that they determine finally all issues of law to be enforced uniformally in the Sate of New York.

Now, I kind of suspected Miss Cunard might come in and request that the Court impose an illegal sentence, and I gave some thought as to how I might respond. Initially I thought, well, what I would do is prepare a presentence memorandum and suggest that the Court impose five years probation, an equally illegal sentence. But on reflection, I realize I have too much respect for the court as an institution and for you as a person to stand before this Court and with a straight face request that you impose an illegal sentence, and consequently I am not going to do that.

I think that Miss Cunard is in error on several points that she made. Firstly, her concept that the Court of Appeals is the only court that would have the power to modify a death sentence, and hence you must impose it and then leave it for them to say the statute is unconstitutional and impose a life sentence, is incorrect.

We know from the remand order in the James case that the Court of Appeals did nothing of the sort. After finding the statute unconstitutional, they remanded the case to trial court to have the trial court sentence the man as though he had been convicted of murder in the second degree. It would be irresponsible for us not to take judicial notice of the Court of Appeals decision in James.

Now, I think I can understand the reason that the People are doing this. Needless to say, there is a lot of public feeling about this incident, and I know from the presentence report that the police officers who were interviewed all felt that the death penalty should be requested by the District Attorney, and the District Attorney feels that he is under certain obligation. However, this approach that the People have taken throughout the trial has not been of any great service to the criminal justice system.

Firstly, as you know, this matter first went to trial in July and resulted in a mistrial—for reasons that I certainly would not care to speculate about at this time. It was determined that this matter must be retried before November, despite the fact that this was not the oldest jail case by a long shot, realizing that the retrial order was issued in July, and furthermore realizing this is an A felony, which doesn't go according to the same rules in any case, and the People would not consent to any adjournment for us to determine what the Court of Appeals would do with the Davis and James cases, even though it was perfectly obvious what the court would do based upon the two Louisiana cases that the United States Supreme Court decided. Consequently, we proceeded to trial in October, and of course this resulted in a mistrial, when the Court of Appeals issued its decision.

I would hate to think how much this cost the taxpayers, and I would like to make it perfectly clear that no speedy trial motion was made by the defense at that time, and the defense was willing to wait until the Court of Appeals issued its decision. All I know is that a thousand jurors were paid $8 a day, who were summoned, and the jury selection process went on for three weeks before the mistrial was issued.

Judge Walsh, who was then the trial judge, took judicial notice, as I think he must, of the Court of Appeals decision. He declared a mistrial and deemed the indictment to be murder in the second degree. The People took an appeal on a very narrow procedural point, in effect reversed him, and had the charge reinstated as a murder-one instead of a murder-two.

Now, the Appellate Division found that the People were correct on that point. Without commenting on the validity of that decision itself, because I don't think that would be proper, I would like to point out what the practical effect has been.

Under the constitution of the State of New York, a defendant has the right to a bench trial in every case but a capital one. When the statutory scheme, which encompasses 60.06 and 125.27 and the relevant portion of the Criminal Procedure Law, was drafted by the Legislature, of course the Legislature prohibited the waiver of a jury trial, since it was contemplated that the entire statutory scheme would deal with a capital case.

By the very narrow reading that the People gave the Court of Appeals decision in James, what they did was deprive the defendant of his right to a non-jury trial in a non-capital case. We couldn't waive a jury here, because it had been reinstated as a murder-one, and the Legislature said in a murder-one you can't waive a jury. On the other hand, it is perfectly clear that the state constitution provides for an absolute right to a non-jury trial in anything but a capital case. God knows how much this case is going to cost the taxpayers.

Fortunately, the case was referred to your Honor for trial, and I think that a great deal of sanity took over. I don't think I would address myself any further on this point. I am absolutely shocked that the People would come before this Court and request, as they did, that you impose an illegal sentence. What I would like to do is move on to the points that I think are really relevant on the sentence.

The Court: Before you do that, the Court will make its ruling with respect to the position of the District Attorney on this issue. And I think just to summarize for the record that we all recognize that at the time that the defendant committed the crime, Section 60.06 of the Penal Law was in effect, which would have mandated the death penalty for the killing of a police officer. At the time he was tried—I believe it was in July of 1977—that statute was still valid. The jury in that case, realizing that the death penalty was in effect, had voted and had been hung

seven to five, seven for murder-one and five for manslaughter-one, on the ground that the defendant had sustained his burden of showing that he was acting under an extreme emotional disturbance.

I think we can only speculate as to whether those five were swayed by the fact that the death penalty was in effect at that time, and they did not feel that this defendant should have that penalty imposed for this particular crime.

Subsequent to that we have, as each of you has stated, the decision on November 15, 1977, in People v. James, declaring Section 60.06 unconstitutional. Now, the Court accepts that decision as invalidating that particular section, and the Court rules that it is without power, and certainly would be improper, in any event, to impose the death penalty in this case. So the application of the District Attorney is denied.

I might also add that we—and I mean defense counsel and the prosecutor—had recognized the dilemma that we were confronted with at the time of impaneling the jury for this trial, and the Court stated the problem on the record and gave counsel the opportunity of submitting briefs and argument on this particular point, because the problem presented itself as to what the jury panel would be told with respect to whether the death penalty was in effect or not.

I did make the determination that we have intelligent jurors in this county who read newspapers, and I did make the statement at the outset. After hearing from both sides, I made the decision that the appropriate and proper action to take was to make the statement to the jury panel that the death penalty was no longer the existing law of this state.

So just to conclude on this subject, the Court finds that the position of the District Attorney in seeking the utilization of Section 60.06, which has been struck down as unconstitutional, is completely untenable, and the Court will not consider it.

Mr. Meisels: Thank you, your Honor.

Mr. Fredreck: May I be heard for one second, just to complete the record?

The Court: All right.

Mr. Fredreck: I think it is only fair to state to your Honor that the record will reflect prior to the trial commencing and after your Honor's ruling pretrial on 60.06 that the People made, the Court and the defendant were aware that we would still seek the death penalty. So I don't think Mr. Meisels should be shocked that we are now doing that.

The only thing is, Mr. Meisels certainly got pangs of consciousness concerning the expense to our taxpayers. What I want to mention is the mistrial in November was asked for by the defense and strenuously opposed by the People. I want the record to reflect that.

The Court: I think we are going a bit far afield.

Mr. Fredreck: There are members of the press here. I don't know what they are going to report. It was requested by the defense.

The Court: All right. You have made your point. We will now move on with respect to the merits involving the sentence.

Mr. Meisels: I have had an opportunity to read the presentence report that was submitted and I note you indicated you received a copy of the presentence memorandum that I submitted, and I would appreciate it if that memorandum could be attached to the presentence report and made a part of it.

The Court: Yes, it will.

Mr. Meisels: I will hand the original to the Court (submitting).

The Court: Proceed, Mr. Meisels.

Mr. Meisels: Your Honor, Mr. Blanks is now 25 years of age. As even the District Attorney has conceded, he has had no prior conflict with the law whatsoever. He has a background of steady employment, and during this trial the Court had an opportunity to see his family, his humble background, and yet despite all of his problems, despite the difficulty he had, this man has never received a dollar on welfare. He has never said to society: You owe me a favor, because I am here. It is perfectly clear that he did whatever he could do, within his limited abilities, to better himself.

There is no indication whatsoever prior to this incident of any antisocial behavior on his part. In fact, I have attached a letter from the minister who knew him in his community, indicating that he was respected in the neighborhood where he grew up. I am sure the People might argue that that was somehow behavior calculated to invoke the sympathy of the Court at a later date, but I really don't think so.

Mr. Blanks, as you know, and I have provided you with a transcript of his college background, has completed two semesters of college. For many of us in the courtroom, that is not a great accomplishment, two semesters in college, but for him, given his background. given the difficulties that he had to overcome, it's quite an accomplishment. It's not only an academic accomplishment, but it's an accomplishment of values and of purpose and of dedication. How many people coming from his background have decided to collect welfare and do nothing and let society support them? Unfortunately, it's a very unpleasant percentage.

What is of critical importance is that all of his achievements were made within the framework of his having severe personality difficulties. We know from the report of the Malcolm Bliss Mental Health Clinic, which I have

attached to my presentence memorandum, that he sought help. He recognized his problems. It's unfortunate that he didn't continue at that clinic. But he understood that he was running into difficulties. And again, his having gone to the Malcolm Bliss Mental Health Clinic occurred long before he ever thought of coming to New York.

Two psychologists examined Mr. Blanks and conducted a battery of tests. Their reports are attached to my presentence memorandum. What I feel is tremendously significant about the psychological testing is that it does not get involved at all with the facts of the incident for which he is on trial.

The two examiners, both highly qualified individuals, who did not consult with each other whatsoever, had absolutely no knowledge of this incident, and as Dr. Grossman testified, from a professional point of view she just wasn't interested, and the substance of those reports, which indicates his severe problem, his thinking disorders, his lack of contact with reality, all of that was learned without any relation whatsoever to the facts of this incident, and consequently I feel that the substance of those reports should receive a high degree of credibility from this Court in considering sentence.

In addition, four psychiatrists testified at the trial—two called by the defense, two called by the prosecution. All four agree that Mr. Blanks suffered from an unstable personality. Three agreed. At least three agreed that this particular situation may very well have been, and probably was, a stressful one for Mr. Blanks. The only serious issue, which was a legal issue and not necesarily one relevant to the question of sentence, was whether or not it was a reasonable stress from the average man's point of view, and as you know from the exception I took to your charge, it is of course my position reasonable stress is subject and not object. But for purposes of

sentence, I don't think that is terribly important. What is important is that these three of the four agreed that for him this may very well have been a stressful situation that he couldn't handle.

I disagree with Mr. Fredreck completely as to the cold-blooded characterization of this incident. Firstly, we know that this happened within a matter of mintues. The longest estimation of time given by any witness at the trial, as I recall it, was ten minutes. Most were much shorter. I think that the time which he had to reflect on his acts is relevant on the question of his moral guilt.

Now, of course, the Court charged the jury that intent can be formed in a second. We understand that. The problem is this. In determining moral guilt, I think we must consider more than that question of the legal formulation of intent.

To give a dramatic example, I think it is far different for someone to get involved in a fight with someone, which he did not anticipate, and unfortunately resulted in killing the other individual in a matter of minutes, and for someone to take out a contract on someone's life. Unfortunately, they both might be characterized as murder, and the only opportunity that we have for drawing the distinction, a moral distinction between those two acts, is on sentence.

We know from this incident that Mr. Blanks was unarmed before this incident occurred, and I disagree with the presentence report where it merely concedes that no arms were found. No witness ever suggested that he was armed. He was never charged with being armed. There is no indication whatsoever that he was armed, other than ultimately with the police officer's gun. This was clearly not a premeditated incident, planned in advance.

I am absolutely shocked at the prosecutor's allusion to the Davis case. Referring to what I know from the trial

testimony, and I observed a fair part of that trial, it appears that Mr. Davis had planned and was in the process of perpetrating an armed robbery of a supermarket, and when someone who identified himself as a police officer interferred, he killed him, and as I recall the testimony, he said, "Oh, you're a cop?" Bang!

It's very different. Firstly, the man was committing a B felony to start with. He was in the process of robbing a supermarket. And then to further his interests above those of society's, he shot someone, in an effort to avoid apprehension. This is an entirely different incident.

If I may allude to the facts of the Lewisboro case that was just tried in our court, the case involved a rape, a burglary, a robbery, and then ultimately a murder, obviously planned, obviously thought through, possibly logically, but thought through for some period of time.

The James case was referred to. This is a situation where a man was awaiting trial on a murder indictment, escapes from custody to avoid trial on the murder indictment, and kills a corrections officer.

The sad part about all of this is that the top count on all of the individuals that I have referred to is murder. None of them are convicted for anything worse than Anthony Blanks, and the only opportunity we have to distinguish between these cases—the rape, the robbery, the burglary and then the murder, the armed robbery and then the murder, the escape and then the murder—is on sentence. And truthfully I feel that the State Legislature has not provided us with an adequate range to distinguish amongst these cases.

As I have indicated in my memorandum, it's because all of these factors are relevant on sentence that the Court of Appeals did strike 60.06, and to me it is extremely significant that an assistant district attorney who

has not been involved in the day-to-day preparation of this case, and is not intimately familiar with it, is the one who stands before the Court making an argument for the death penalty. In fact, it was Mr. Fredreck who went to the scene and did a thorough job of investigation; it was Mr. Fredreck who prepared this case for trial; it was Mr. Fredreck who tried the case twice; it was Mr. Fredreck who drafted, prepared, and won the only significant motion made by the People in this case.

I might also point out that even the Probation Department does not recommend a maximum sentence in this case. They merely indicate to you under their recommendation that the state requires incarceration.

The Court: I don't know that that is one-hundred percent accurate. I don't think they are making any recommendation. Under "Recommendation" they merely say incarceration is mandated by New York State. So they are certainly not recommending anything less. They are not recommending the minimum or the maximum.

Mr. Meisels: On occasion they have made recommendations and it does differ from that.

The Court: I understand. As a general rule, I don't think they do make a specific recommendation.

Mr. Meisels: Very well. Now, with reference to that presentence report, your Honor, I wish to make certain observations. Unfortunately, the officer who prepared it, in determining his facts, as he concedes, made that determination based upon a conversation with the District Attorney's office, and consequently there are some nuances there—

The Court: Yes; the conversations with the prosecutor, the police, that is, the police in Larchmont, and the defendant.

Mr. Meisels: Yes. There is one very important element missing. In speaking with counsel for the People, I think he might have at least consulted with counsel for the defense, particularly in a case of this importance. Consequently, there are certain nuances that I think are lacking. For example, needless to say, the People have indicated no weapon was found. Well, in fact we know the man was unarmed.

In terms of eliciting recommendations—and this is I think the greatest failure of the presentence report—the probation officer asked the various police officers who knew Arthur DeMatte as to what they think the sentence ought to be, which may in and of itself be all right; but the problem is he never spoke to anybody who is intimately involved with Anthony Blanks as a human being to determine what their recommendations might be.

He never spoke to the psychiatrists who treated him at the trial. He never even spoke to the prosecution psychiatrist who testified at the trial, no less the defense psychiatrists. He never spoke to the psychiatric social worker at the jail, who has dealt with this man now for 15 of the 16 months he has been incarcerated.

What he sought to do—and I am sure not consciously—was to only speak to those people who had little or no contact with Blanks, but were aware of the fact that he killed another member of the police department. This is not the type of recommendation that is relevant to sentence. These people knew nothing about Anthony Blanks as a person.

There are several misstatements in the presentence report about jobs for which Mr. Blanks has applied. For example, in reference to his application for a job with the Metropolitan Police Department, the presentence report indicates that he sought an application but never returned it. That is inadequate. In fact, he was fingerprinted in reference to his application, and was rejected, and told the reason for his rejection was his underweight in reference to his size. I think that the presentence report leaves the impression that this was just a casual inquiry on his part that he never followed through on it. In fact, he followed

through on it to the point where he was told he would not be considered. And to stack that type of fact against him is exceedingly unfair.

Unfortunately, the probation officer indicates that certain records were unavailable to him. I wish he called me. For example, the college transcript. He leaves the impression in the presentence report it's sort of an allegation on the part of the defense that this guy even went to college; you know, we haven't verified it. The transcripts were marked for identification at the trial. I have them now for a year and they are part of my presentence memorandum. So for those reasons I would ask that the Court understand the allegations made in the presentence report in view of the source from which they come.

In view of everything I have stated to the Court and the fact that you have presided over the trial, and I know you are intimately familiar with the facts of it, I would ask that the Court be as merciful as possible in imposing sentence, and I would submit to the Court that it would appear to me that for all the reasons I have indicated, a minimum sentence would be justified.

The Court: Thank you, Mr. Meisels.

Mr. Blanks, before sentence is imposed, do you have anything to say to the Court?

The Defendant: Yes, I do.

The Court: Would you please stand?

The Defendant: Yes, sir.

Your Honor, I feel I have been tried. I feel that the case itself was somehow prejudiced towards me. I feel that if I have any guilt and if in this court guilt was proven, that somehow the unfairness of this trial itself brought about a guilty verdict that I felt was not guilty at all, at least for my benefit.

I felt that the trial itself proceeded like it had went through this action once before, like this was the beginning

of the first trial when I was not found guilty of murder in the first degree, but I was convicted of possession of a weapon. It seemed to me that the jurors that I had were very unattentive, that they weren't listening very well to some of the testimonies, and I feel that some of the witnesses that testified were testifying in such a way that it was hard for the jury that I had selected to understand.

I also felt that although the process of the trial proceeded similarly to how it had proceeded the first time I went to trial, that this particular time some of the evidence that was admitted into my trial I felt was unfair and that it really had a great bearing on the sentence, on the conviction that was given to me.

Also, your Honor, I feel that the charge itself was unfair to me, also. I feel that I could have been charged with murder in the first degree, murder in the second, manslaughter-one manslaughter in the second degree, self-defense, criminal negligent homicide, all the way down to all the various counts.

I feel as far as the newspaper and publicity went that I was treated quite fair, that I wasn't in any type of way hindered or harmed, as far as the publicity went. I feel that during the course of this trial that I was experiencing problems which I felt was affecting the way that I may have carried or presented myself, and that these mental problems that I was experiencing at that particular time beared a great importance on my trial itself.

I feel that I have requested to the court, not just this particular time, but all three times that I have went to trial or prepared for trial, to have some type of assistance to deal with some of the problems that I was experiencing.

I have been treated I feel very unfair, not only within the court system, but within the institution of Westchester County Jail itself. I feel I have underwent a great amount of pressure, and I feel that these pressures really affected

me, not before the incident, but it affected me during the course of going through the trial itself. All I can say is that I feel justice hasn't been given to me. I feel that if there is any such thing as justice, that I have seen very little of it.

I know that there are a lot of individuals who are maybe guilty or who are maybe innocent and may have the opportunity by proving with the fact alone that they have not committed the crime or that they are somehow not in excess of being guilty, because the evidence itself does not show that individuals have committed a particular act. But I feel that also because of my color and the community in which the crime took place, that I am really getting a harsher type of treatment, not just from the courts, but from the system completely.

I have nothing else to say.

The Court: You may be seated.

I would make this comment, Mr. Blanks, based upon your words. In the judgment of the Court, you have received a fair trial. Your side of the case has been presented very ably by your attorney. You have testified and given your version to the jury. The jury has heard you and your entire defense and has rendered its verdict, which the Court feels was completely justified under all of the circumstances that were presented at the trial.

I would also make this observation with respect to your claim of unfairness and comment about prejudice. When you were apprehended by the police from the bushes over in Larchmont and then asked why you didn't come out, your reply was that if the same thing had transpired where you came from, that you wouldn't have been alive very long. I think that is completely inconsistent with your claim.

In any event, the Court does want to indicate for the record that we have had a presentence conference with

defense counsel and the prosecutors. The Court has carefully considered the presentence report provided by Probation and has made this available to defense counsel, as he has indicated.

I have the presentence memorandum that Mr. Meisels has provided, which is a very good one, I believe, and Mr. Meisels should be complimented for it. This presentence memorandum contains the attachments that he has referred to: the Second Corinthian Babtist Church pastor submitting a letter on behalf of the defendant; the Malcolmn Bliss Mental Health report is also included as an attachment, together with the Forest Park St. Louis Community College transcript; the report from the psychologists, Dr. Grossman and Dr. Schwartz.

The Court has carefully considered all of these factors, and I think in making a judgment on a crime of this magnitude there are three aspects to be considered, and certainly the first would be the defendant, the second one the crime itself, and thirdly, and not to be overlooked, is the victim.

In considering the defendant, defense counsel has certainly stressed, and quite properly, that this individual has no prior criminal record, not even an arrest, and of course this is a very important and mitigating factor. In addition to that, the Court has found his claims of remorsefulness which were indicated to the probation officer and certainly included in the report. These things are on the mitigating side.

Then there is the other side of the coin, specifically, the aggravating circumstances, and while defense counsel speaks about his educational efforts, I would classify these, together with the other evidence that we have received, as an important factor to indicate that this individual is not one of low intelligence. Dr. Grossman indicates the IQ in the range of 117 or 119, which is better than average. Dr.

Schwartz places this a little bit less. We are not dealing with an individual who is below average in intelligence, which would further indicate that he certainly can't be excused for his conduct because of his lack of intelligence.

He has had educational opportunities and has obviously had perhaps slightly better than average grades in the Forest Park St. Louis Community College.

Then we can move on, and in considering the background of the defendant, I certainly would concede, from all the evidence which has been presented, that the family was poor. There are many poor families in America. However, there is one thing of considerable significance in my judgment, and that is the family relationship was very good, particularly in the relations of this individual with his mother. Concededly, the fathers were variable after the deaths of some of his fathers, and so forth, and there was a series of fathers. Nevertheless, the relationship of this individual with his mother was very good, and he had a very strong support in the family in that regard. Also, I think it was indicated to be reasonably good with some of the siblings. So much for the consideration of the defendant.

Moving on to the crime itself—and I think Mr. Meisels has made a strong and perhaps meritorious contention with respect to the crime not being premeditated. There is no question that as Anthony Blanks traveled up the railroad tracks between New Rochelle and Larchmont on the day of the crime he did not have in his mind the killing of police officer Arthur DeMatte. When that came into his mind, we can't be absolutely certain. But he didn't have it when he was coming up the railroad tracks and when he got off them and met the police officer.

However, the events of this crime were witnessed by more than a dozen completely disinterested witnesses, who told what they saw. They had absolutely no motive whatsoever to distort or to color in any way the observations which

they made, and since this was outside a Daitch Shopwell at approximately ten minutes of six on a regular day, there was considerable pedestrain, perhaps even auto traffic in the area.

The part that is in the judgment of the Court most heinous about this offense is that there was a struggle, wrestling, the defendant, obtaining the gun of officer DeMatte, of shooting him. But now we get to the part which is the most aggravated of all. This defendant pursued a disarmed wounded man, a police officer, as a hunter would pursue his quarry. He fired a second shot over the head of the defendant in pursuit. The pursuit continued. The police officer was bleeding profusely from the injury in the arm, and then, and most significantly of all, the defendant —and he has admitted this on the stand—took the revolver, the police officer's revolver, held it out, and then placed his left hand under the right hand to give more support for the shot which he ultimately killed the victim, Arthur DeMatte, with. Certainly this, in the judgment of the Court, is a cold-blooded killing.

Moving on with respect to the crime, and in effect an attempt to cover up the crime, we are all well-acquainted from the facts of the story that the defendant gave the police that he was with another individual, a white man; he provided his name; he provided a physical description, by the way, by height, by hair; he further gave a description of the car that the individual fled in and claimed that it was this individual who killed Officer DeMatte.

When this lie was exploded with the testimony of the witnesses who were at the scene, the next contention of the defendant was that the officer had a nightstick and he was acting in self-defense. The prosecutor had described the stories of the defendant as a web of lies, and it could well be that the jury accepted that characterization. So much for the crime itself.

Moving on to the victim, we have a police officer who was acting in the service of the citizens of his community at the time of this crime, 46 years old. This man has had his life shortened by a quarter of a century, possibly a little more, possibly a little bit less. He was a married man, devoted husband and father, had four children. He was described by his colleagues as a warm, likable, outgoing individual, vitally concerned for the education of his children, an individual who worked at extra jobs to get more money to accomplish these objectives.

The Court has taken all of these factors and circumstances into account, and while the one very prominent mitigating circumstance that the defense stresses could well tip the scale on a death sentence consideration, I feel that it is insufficient in this case to prevent anything other than a maximum sentence to be imposed.

Mr. Blanks, would you please stand.

It is the judgment of this Court that you be sentenced to an indeterminate sentence of imprisonment which shall have a maximum term of life, and the Court hereby imposes a minimum period of imprisonment of 25 years, and that you are to be committed to the custody of the New York State Department of Correctional Services, and that you be delivered to the Westchester County Department of Corrections, there to be dealt with in accordance with the provisions pertaining to your sentence. The Court has imposed this sentence under the A-1 felony provisions of the Penal Law.

Anthony Blanks, the Court wishes to advise you that you a right to appeal from this sentence if you feel aggrieved by it, and you may obtain private counsel. If you do not have funds to obtain your own counsel, you can request the Clerk of the Appellate Division of the Second Department to assign counsel, if you so desire. You have 30 days within which to file a notice of appeal.

Do you understand that right?

The Defendant: Yes, I do. Yes, your Honor.

Mr. Meisels: Your Honor, in reference to the second count of the indictment which was not on trial before your Honor, I would request that sentence be imposed as quickly as possible.

The Court: Yes. The trial that we have previously referred to which took place back in July of last summer did have the verdict of criminal possession of a weapon in the second degree. That trial was before Judge Dachenhausen, and it is my understanding that he is going to be available for this sentence next Monday, which would be February 27th.

Mr. Meisels: Very well.

The Court: Any comment about that?

Mr. Fredreck: I don't know about the 27th. I was going to check it this afternoon. I would agree with Mr. Meisels the sentencing should take place as quickly as possible so that a bring-back order would not be necessary for this defendant. I will see to it personally, your Honor.

The Court: Is there anything else to come before the court?

Mr. Meisels: No, your Honor.

CERTIFICATION

I, JERRY PELLIS, C.S.R., official court reporter, hereby certify that the foregoing matter is a true and correct transcript of the minutes taken by me, to the best of my ability.

JERRY PELLIS

Appendix D, Opinion People v. Blanks.

(November 22, 1977)

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. ANTHONY BLANKS, Respondent.—Appeal by the People from an order of the Supreme Court, Westchester County, dated November 18, 1977, which, *inter alia*, (1) granted defendant's motion for a mistrial and (2) deemed the indictment to be amended so as to charge murder in the second degree. Order modified, on the law, by deleting from the second decretal paragraph thereof all language after the words "is denied". As so modified, order affirmed. The stay contained in the order to show cause returnable November 22, 1977 is hereby vacated. We hold that the determination of the trial court was erroneous and that the case should proceed to trial under the indictment as originally handed down by the Grand Jury. Cohalan, J.P., Margett, Damiani and Shapiro, JJ. concur.

STATUTES.

Penal Law

§ 15.05 Culpability; definitions of culpable mental states

The following definitions are applicable to this chapter:

1. "Intentionally." A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.

2. "Knowingly." A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists.

3. "Recklessly." A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.

4. "Criminal negligence." A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

§ 15.25 Effect of intoxication upon liability

Intoxication is not, as such, a defense to a criminal charge; but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged.

§ 30.00 Infancy

1. A person less than sixteen years old is not criminally responsible for conduct.

2. In any prosecution for an offense, lack of criminal responsibility by reason of infancy, as defined in subdivision one of this section, is a defense.

§ 30.05 Mental disease or defect

1. A person is not criminally responsible for a conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity to know or appreciate either:

(a) The nature and consequence of such conduct; or

(b) That such conduct was wrong.

2. In any prosecution for an offense, lack of criminal responsibility by reason of mental disease or defect, as defined in subdivision one of this section, is a defense.

§ 40.00 Duress

1. In any prosecution for an offense, it is an affirmative defense that the defendant engaged in the proscribed conduct because he was coerced to do so by the use or threatened imminent use of unlawful physical force upon him or a third person, which force or threatened force a person of reasonable firmness in this situation would have been unable to resist.

2. The defense of duress as defined in subdivision one of this section is not available when a person intentionally or recklessly places himself in a situation in which it is probable that he will be subjected to duress.

§ 60.05 Authorized dispositions; class A, B, certain C and D felonies and multiple felony offenders

1. Class A felony. Every person convicted of a class A felony must be sentenced to imprisonment in accordance with section 70.00, unless such person is convicted of either murder in the first degree and is sentenced to death in accordance with section 60.06, or of a class A-III felony and is sentenced to probation in accordance with section 65.00.

§ 60.06 Authorized disposition; murder in the first degree

When a person is convicted of murder in the first degree as defined in section 125.27, the court shall sentence the defendant to death.

§ 125.20 Manslaughter in the first degree

A person is guilty of manslaughter in the first degree when:

1. With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or

2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.05. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circum-

stance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision; or

3. He commits upon a female pregnant for more than twenty-four weeks an abortional act which causes her death, unless such abortional act is justifiable pursuant to subdivision three of section 125.05.

Manslaughter in the first degree is a class B felony.

§ 125.25 Murder in the second degree

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime; or

2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person; or

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

Murder in the second degree is a class A-I felony.

§ 125.27 Murder in the first degree

A person is guilty of murder in the first degree when:

1. With intent to cause the death of another person, he causes the death of such person; and

(a) Either:

(i) the victim was a police officer as defined in subdivision 34 of section 1.20 of the criminal procedure law who was killed in the course of performing his official duties, and the defendant knew or reasonably should have known that the victim was a police officer; or

(ii) the victim was an employee of a state correctional institution or was an employee of a local correctional facility as defined in subdivision two of section forty of the correction law, who was killed in the course of performing his official duties, and the defendant knew or reasonably should have known that the victim was an employee of a state correctional institution or a local correctional facility; or

(iii) at the time of the commission of the crime, the defendant was confined in a state correctional institution, or was otherwise in custody upon a sentence for the term of his natural life, or at the time of the commission of the crime, the defendant had escaped from such confinement or custody and had not yet been returned to such confinement or custody; and

(b) the defendant was more than eighteen years old at the time of the commission of the crime.

2. In any prosecution under subdivision one, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime except murder in the second degree; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime except murder in the second degree.

Murder in the first degree is a class A-1 felony.

Criminal Procedure Law

§ 450.20 Appeal by people to intermediate appellate court; in what cases authorized

An appeal to an intermediate appellate court may be taken as of right by the people from the following sentence and orders of a criminal court:

. . .

4. A sentence other than one of death, as prescribed in subdivisions two and three of section 450.30;

§ 450.30 Appeal from sentence

. . .

2. An appeal by the people from a sentence, as authorized by subdivision four of section 450.20, may be based only upon the ground that such sentence was invalid as a matter of law.

§ 450.70 Appeal by defendant directly to court of appeals; in what cases authorized

An appeal directly to the court of appeals may be taken as of right by the defendant from the following judgment and orders of a superior court:

1. A judgment including a sentence of death;

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

NO. 78 - 287

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

-against-

ANTHONY BLANKS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent submits this brief in opposition to the captioned petition for a Writ of Certiorari pursuant to Rule 24.

The attached papers are prepared in conformity with Rule 47.

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FACTS

Anthony Blanks, a college student, unable to find employment, left his home in St. Louis, Missouri on October 8th, 1976 arriving in New York on October 9th, 1976 by train. Having left his personal belongings with relatives in New York City, he began walking along the Penn Central railroad tracks (New Haven Division) in an easterly direction, away from the heart of the city.

Being totally without funds, he proceeded along the tracks for almost two days without food or sleep.

As a result of physical and emotional stress, he did not hear an eastbound commuter train which almost struck him from the rear. Despite repeated whistle warnings which were audible for one mile, Mr. Blanks failed to move from the tracks thereby forcing the train into an emergency stop. He was missed by a matter of a few feet. Larchmont, New York, police were notified and responded.

Mr. Blanks who was unarmed, committing no crime and who had no prior conflict with the law was confronted by Police Officer Arthur DeMatte. An altercation ensued. The officer who was armed with a gun and knife, but not with a nightstick, drew his revolver. Mr. Blanks in fear of his life, struggled over the gun with the officer. As a result of that struggle, the officer was fatally wounded with his own weapon.

At the trial of this matter, two psychiatrists testified that Mr. Blanks was suffering from an extreme emotional disturbance at the time the officer was shot. In addition to extensive interviews with Mr. Blanks, their opinions were based upon the results of psychological testing and medical records of Mr. Blanks' prior efforts to obtain psychiatric treatment. Four psychiatrists, including the two defense witnesses mentioned above and two called by the District Attorney, testified that he suffered from an unstable personality.

The jury, having been advised by the trial judge that this was not a capital case and that the death penalty could not be imposed, found Mr. Blanks guilty of Murder, in the First Degree.

Pursuant to the authority of People v. Davis, 43 N.Y. 2d 17, 400 N.Y.S. 2d 735, 371 N.E. 2d 456 (1977), cert. den. sub. nom. New York v. James, _____U.S._____ (June 27, 1978), the trial judge declined to impose the death penalty and sentenced Mr. Blanks to life in prison.

It should be noted that this case originally proceeded to trial prior to the decision in Davis, supra., at which time the jury was informed that a conviction would mandate a death sentence without regard for any mitigating factors. The initial trial resulted in a mistrial based upon a hung jury evenly divided for acquittal on the capital charge of Murder, in the First Degree.

POINT I

NO FEDERAL QUESTION WAS DECIDED
IN THE STATE COURTS BELOW.

As a matter of New York State law, the Trial Term of the Supreme Court of the State of New York was bound to follow the State Court of Appeals decision issued in People v. Davis, 43 N.Y. 2d 17, 400 N.Y.S. 2d 735, 371 N.E. 2d 456 (1977), cert. den. sub. nom. New York v. James, _____ U.S._____ (June 27, 1978). A legal determination by the state's highest court must be followed uniformly throughout the state. Consequently, the Appellate Division of the Supreme Court was bound by the same authority.

The state courts never decided the question raised in Point I of petitioner's brief at any stage of the proceedings in this case (Appendix A and Appendix B of petitioner's brief). Unless it appears from the record that a federal question was both raised and decided in the state courts, this court is without jurisdiction to review the judgment herein. 28 USCS 1257 (3); Southwestern Bell Telephone Co. v. Oklahoma, 303 U.S. 206 (1938); Cardinale v. Louisiana, 394 U.S. 437 (1969).

POINT II

THE NEW YORK MANDATORY DEATH PENALTY STATUTE WHICH DOES NOT PERMIT THE SENTENCER TO CONSIDER ANY MITIGATING FACTORS SUCH AS THE CHARACTER AND PRIOR RECORD OF THE OFFENDER OR THE PARTICULAR CIRCUMSTANCES OF THE OFFENSE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Respect for human dignity requires consideration of aspects of the character of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of imposing the death sentence. Because every offender is a uniquely individual human being, not a member of a faceless, undifferentiated mass to be subjected to the blind infliction of death, Penal Law Section 60.06 (text reproduced in petitioner's brief, Page 33a) violates the Eighth and Fourteenth Amendments to the United States Constitution. Woodson v. North Carolina, 428 U.S. 280 (1976).

Even if the offense in question were narrowly defined, as petitioner alleges, fundamental respect for humanity requires that the sentencer be permitted to consider mitigating circumstances

such as the lack of any prior convictions[1] or the existence of an extreme emotional disturbance which might attend the killing of a peace officer.[2] Harry Roberts v. Louisiana, 431 U.S. 633 (1977). Under present New York State law, evidence of an extreme emotional disturbance, an affirmative defense, may only be considered by the trial jury if the accused is able to establish such a disturbance by a preponderance of the evidence. Penal Law Section 125.27 (2) (a) (statute reproduced in petitioner's brief, Page 37a); Patterson v. New York, 432 U.S. 197 (1977). The sentencer is precluded from consideration of evidence of emotional disturbance unless the accused can meet that burden of proof at the trial stage of the proceedings.

To meet constitutional muster, a death penalty statute must provide a meaningful basis for distinguishing cases in which death is imposed and those in which the life of the offender shall be spared.

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1. Anthony Blanks has sustained no prior conflict with the law whatsoever which the trial court found to be an important mitigating factor on sentence. (petitioner's brief, appendix C, page 25a).

2. Two psychiatrists called by defense testified that Anthony Blanks suffered from an extreme emotional disturbance at the time of this incident. Four psychiatrists, two called by the defense and two called by the prosecution, testified that Anthony Blanks suffered from an unstable personality.

Consideration of the offender's lack of criminal record is vital. Clearly, the offender's character, prior record and degree of participation are relevant. The circumstances surrounding the incident, which may not give rise to a legal defense, may be critical to the selection of the appropriate, individualized sentence.[3] Lockett v. Ohio, _____ U.S. _____No. 76-6997 and Bell v. Ohio, _____U.S._____No. 76-6513 (July 3, 1978).

3. As the trial judge indicated, the offense herein was clearly not premeditated (petitioner's brief, appendix C, page 26a).

CONCLUSION

New York State Penal Law Section 60.06, which this court declined to review in the James case, supra., does not permit the sentencer to consider relevant mitigating factors which an offender may reasonably proffer as a basis for a sentence less severe than that of death. Consequently, said statute violates the Eighth and Fourteenth Amendements to the United States Constitution.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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